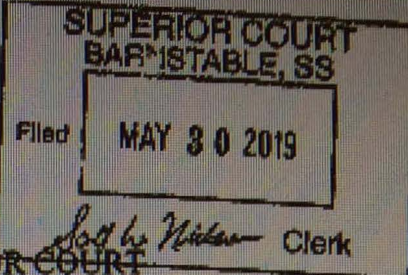


COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS.

SUPERIOR COURT  
C.A. No.: 1272CV00638



DAVID LEW, ADMINISTRATOR OF THE  
ESTATE OF JASON LEW,  
*Plaintiff*

v.

MEREDITH GILSON, M.D.,  
DENISE DALLACOSTA, R.N., and  
PMG PHYSICIAN ASSOCIATES, P.C.,  
*Defendants*

**TRIAL BRIEF OF THE DEFENDANT PMG PHYSICIAN ASSOCIATES, P.C. AS TO  
JURY INSTRUCTIONS PERTAINING TO CAUSATION**

NOW COMES the Defendant, PMG Physician Associates, P.C. and hereby submits this trial brief addressing the need for certain instructions pursuant to decisions of the Supreme Judicial Court, as well as the Third Restatement of Torts, pertaining to the inapplicability of substantial contributing factor language in any determination or instruction as to causation in this matter. The instructions are needed as a result of the Supreme Judicial Court's decision in Matsuyama v. Birnbaum, 452 Mass. 1 (2008), discussing that the substantial contributing factor test is an inappropriate measure of causation for certain actions, as well as the position of the Third Restatement of Torts, in which the "substantial contributing factor" language has been abandoned in determining causation.

In the instant matter the Plaintiff alleges that the Defendants were negligent when they breached the applicable standard of care relative to the care and treatment provided to Plaintiff's decedent Jason Lew in April 2011, as to cause him injury and death.

# **I. Substantial Contributing Factor Language: Misapplication and Its Consequences**

Use of the term substantial contributing factor for determining causation has been historically accepted by some courts in cases where joint tortfeasors' actions indivisibly combine to produce harm and where application of the but-for test for causation would allow each defendant to evade responsibility.<sup>1</sup> In July 2008, the Massachusetts Supreme Judicial Court declined to extend its use beyond the narrow category of cases with indivisible multiple causation. See Matsuyama v. Birnbaum, 452 Mass. 1, 3, 30-31 (2008). In Matsuyama v. Birnbaum, the executrix of an estate brought a medical malpractice wrongful death action alleging loss of chance of survival against the decedent's medical providers for misdiagnosing the decedent's gastric cancer. See id. at 6-7. The Matsuyama Court found that the substantial contributing factor causation is appropriate in multiple cause cases where "it may be impossible to say for certain that any *individual* defendant's conduct was a but-for cause of the harm, even though it can be shown that the defendants, in the aggregate caused the harm." Id. at 30 (emphasis in original). The substantial factor test is otherwise inappropriate. See id. at 30-31.

<sup>1</sup>See Dan B. Dobbs, Robert E. Keeton, David G. Owen, Prosser And Keeton on Torts, (5th ed.1984). Anderson v. Minneapolis, St. Paul, & Sault Ste. Marie, Railway Co., 179 N.W. 45 (Minn. 1920), is often credited as the first case to use substantial factor language. See Restatement (Third) of Torts § 26 cmt. 1 (Tentative Draft No.2, Mar. 25, 2002) (crediting Anderson as first adopting substantial factor test). In Anderson, two fires converged to destroy plaintiff's property, 179 N.W. 45 (Minn. 1920). Because each of the fires was sufficient to cause the plaintiff's injuries, a but-for jury instruction to evaluate causation was useless; but-for fire A, fire B would have destroyed the premises and but-for fire B, fire A would have destroyed the premises. See David Jakubowitz Help, I've Fallen and Can't Get Up! New York's Application of the Substantial Factor Test, 18 STJLC 593 (2004). Analyzed under but-for causation, neither defendant would have been found liable for the fire, a result that would be undesirable from an equitable as well as a public policy standpoint. See also Richard Wright, Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility, 54 VNLR 1071, 1098 (2001) (calling such an outcome "absurd."). A similarly objectionable outcome would have been produced by but-for causation in Corey v. Havener, 182 Mass. 250 (1902), had the trial court not applied the concept of substantial contributing factor causation instead. In Corey, two defendants on motorcycles, independent of each other, raced past either side of a horse drawn wagon, frightening the horse and causing an accident. Id. Since it was not possible to determine what portion of the accident either defendant had caused, the jury held both liable for the accident. Id. at 252. As in Anderson, the defendant's actions could not be separated and both were adequate causes of the accident on their own. The Massachusetts Supreme Judicial Court found the application of the substantial contributing factor test proper.

The Matsuyama Court relied on O'Connor v. Raymark Industries, 401 Mass. 586 (1988). See Matsuyama, 452 Mass. at 31 n. 47. In O'Connor, a shipyard welder was exposed to numerous asbestos products manufactured by a number of different companies in the course of his employment. O'Connor, 401 Mass. at 586-87. He and his wife subsequently sued all of the manufacturers of the asbestos products to which he had been exposed. Id. at 586. Sixteen of the named defendants settled out of court, leaving Raymark the sole defendant at trial. Id. at 587. The O'Connor Court found since "*two or more wrongdoers negligently contribute[d] to the personal injury of another by their several acts, which operate concurrently, so that in effect the damages suffered are rendered inseparable,*" the application of the substantial contributing factor test in lieu of the but-for test to determine causation was appropriate. Id. at 591 (internal citations omitted) (emphasis added). Unlike Matsuyama, O'Connor fell into the narrow category of cases, sometimes referred to as "combined force" situations<sup>2</sup> or "multiple sufficient causes"<sup>3</sup> where the application of the substantial contributing factor test has been found to be appropriate. Despite its limited purpose and applicability, or perhaps because of it, substantial contributing factor language has not been properly utilized and has been misapplied in many cases.

Much of this misuse and misunderstanding stems from its treatment in the Restatement (Second) of Torts. The substantial contributing factor language has been used interchangeably with the but-for test as well as test for legal cause, also referred to as proximate cause, resulting in further confusion and misuse. The Second Restatement uses substantial factor as a synonym for the but-for test in section 432(1); as an alternative to the but-for test that is available in a limited range of situations found in section 432(2); and as part of an approach to the discrete

<sup>2</sup> Wex S. Malone, Ruminations on Cause-in-Fact, 9 Stan. L. Rev. 60, 88-94 (1956).

<sup>3</sup> Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 26, Cmt. J (2005).

issue of legal cause in sections 431 and 433. See Restatement (Second) of Torts, (1965); see also Robertson, The Common Sense of Cause-In Fact, 75 Tex. L. Rev. 1765, 1776-77 (1997).

The result has been multiple meanings and usage far beyond its intended purpose, the most common being the use of substantial contributing factor language in determinations of *both* cause in fact, and legal or proximate cause.<sup>4</sup> This has led to confusion and misunderstanding in the courts and with juries, which has generated severe scholarly criticism.<sup>5</sup> Indeed, in its draft of the Restatement (Third) of Torts, the American Law Institute (ALI) acknowledged and addressed this problem by completely rejecting substantial contributing factor language for causation determinations. See Restatement (Third) of Torts: Liability for Physical Harm (Proposed Final Draft No. 1, 2005).

Substituting the substantial contributing factor test for the but-for test in evaluating causation creates ambiguity in the standard of proof, if not a severe risk that the standard of proof may be altered. The ALI has found that the vagueness of the substantial contributing factor test may "*unfairly permit proof of causation on less than a showing that the tortious conduct was a but-for cause of harm or may unfairly require some proof greater than the existence of but-for causation.*" Proposed Restatement (Third) of Torts § 26, Reporters Notes, Comment J (emphasis

<sup>4</sup> The concept of the substantial factor was originally proposed by Jeremiah Smith as a guide for resolving legal (proximate) cause issues. See Jeremiah Smith, Legal Cause in Actions of Torts, (pts. 1-3) 25 Harv. L. Rev. 103, 223, 303 (1911-1912). As Richard Wright explains, Smith proposed that under substantial factor analysis "defendant's tort must have been a substantial factor in producing the damage complained of." Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility, 54 Vand. L. Rev. 1071, 1079 (2001) (citing Smith, Legal Cause in Actions of Torts, 25 Harv. L. Rev. 303, 309 (1911-1912)). The accompanying explanation to this proposed analysis "clearly stated that the defendant's *tortious conduct could not be a substantial factor unless it not only satisfied the but-for test (with an exception for simultaneous, independently sufficient conditions), but also was an appreciable and continuously effective or efficient factor in producing the harm, up to the time of the occurrence of the harm.*" *Id.* (emphasis added).

<sup>5</sup> See *infra* note 11.

added). Substantial factor language was never intended to be used as a substitute for but-for causation.<sup>6</sup>

Although it may have produced the desired outcome, the use of substantial factor language in O'Connor obliged jurors to characterize the negligence of the defendant as possible, rather than more probable than not. This may be a nuanced alteration in the standard of proof, but it is an alteration nonetheless. Consider the definitions of the two terms:

Possible: *adj.* 1. that may or can be, exist, happen, be done, be used, etc. 2. that may be true or may be the case, as something concerning which one has no knowledge to the contrary.<sup>7</sup>

Probable: *adj.* 1. likely to occur or prove true 2. having more evidence for than against, or evidence that inclines the mind to belief but leaves some room for doubt 3. affording ground for belief.<sup>8</sup>

The very nature of the asbestos manufactured by Raymark and others did not allow for an evidentiary finding as to whether or not it was Raymark asbestos that caused the harm to the plaintiff. The jurors did not have more evidence for or against Raymark's contribution to the plaintiff's injuries. There were no exhibits of particles removed from plaintiff's lungs that could be linked to any one defendant, let alone Raymark. Rather, through the substantial factor language the jury was asked to consider merely the *possibility* of Raymark's contribution; it *may* have been true or it *may* have been the case that Raymark's asbestos caused the injury in the absence of no knowledge to the contrary.

Not only does the substantial contributing factor test create ambiguity in the burden of proof, the very language of the test is, itself, ambiguous. What is substantial? Is 25 a substantial part of 100?<sup>9</sup> A court could look to a dictionary; however, Webster's New Third Dictionary

<sup>6</sup> See *supra* note 4.

<sup>7</sup> Random House Unabridged Dictionary, Random House, Inc. 2006.

<sup>8</sup> See *supra* note 7.

<sup>9</sup> See Jakubowtiz *supra* note 1.

contains four possible and accepted meanings of the word.<sup>10</sup> Even the MCLE Massachusetts Superior Court Civil Practice Jury Instructions offer several possible definitions of the term "substantial." See MCLE §4.3.3.

One way of defining "substantial" employed by the MCLE Model Instructions is "not an insignificant factor," or "material and important ingredient." See MCLE § 4.3.3(b), Practice Note. This definition in no way obviates the problem of meaningful protection against dilution to the more probable than not standard. Richard Wright has referred to substantial factor language as "'completely useless...[a]s not so much a test as an incantation. It points neither to any reasoning nor to any facts that will assist courts or lawyers in resolving the question of causation.'" 54 Vand. L. Rev. 1071, 1080 (citing Dan B. Dobbs, The Law of Torts, 416 (2000)).

The ability to clearly define the word "substantial" for jurors is a common problem. In O'Connor, the jury required clarification and re-instruction as to the meaning of "substantial." See 401 Mass. at 590. See also Seward v. Minneapolis St. Ry. Co., 25 N.W. 2d 221, 224 (Minn. 1946) (using substantial factor for factual cause "leaves the jury afloat without a rudder...and to decide the case according to whim rather than law."); Wolfe v. Estate of Custer, 867 N.E.2d 589, 599 ("what constitutes a substantial factor may be difficult to describe"); Moisakis v. Allied Building Products Corp., 697 N.Y.S.2d 100, 104 (1999) (stating jurors claimed they were confused by the term substantial factor on verdict sheet and requested a new sheet during deliberations because they had made an error on the first sheet); Clarke v. Order of the Sisters of St. Dominic, 710 N.Y.S.2d 108, 109 (2000) (citing Moisakis and noting new trial appropriate

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<sup>10</sup> Substantial<sup>1</sup>adj 1 a: consisting of, relating to, sharing the nature of, or constituting substance: existing as or in substance: material b: not seeming or imaginary: not illusive: real, true c: being of moment: important, essential 2 a: adequately or generously nourishing: abundant, plentiful b: possessed of goods or an estate: moderately wealthy: well-to-do; often: having a good and well maintained income producing property c: considerable in amount, value, or worth 3 a: having good substance: firmly or stoutly constructed: sturdy, solid, firm b: having a solid or firm foundation: soundly based: carrying weight 4 a: being that specified to a large degree or in the main b: of or relating to the main part of something syn. see missive. Webster's Third New International Dictionary (1993).

where jurors encounter confusion rendering verdict). Even Prosser, a one time supporter of substantial contributing factor causation, cautioned its use due to the potential for confusion over the meaning of the term;

"substantial factor" seemed sufficiently intelligible as a guide in time past, however, the development of several quite distinct and conflicting meanings of the term "substantial factor" has created a risk of confusion and misunderstanding, especially when a court, or an advocate or scholar, uses the phrase without indication of which of the conflicting meanings is intended. See Prosser & Keeton, Prosser and Keeton on Torts, § 41 at 43-45 (5th ed. Supp. 1988).

Prosser is not alone in his criticism of substantial contributing factor language. The concept no longer garners support from the scholarly community.<sup>11</sup>

The confusion and misapplication surrounding the substantial factor language has led the ALI to reject its use entirely.<sup>12</sup> The Third Restatement reaffirms that the focal point of a causation inquiry is the but-for test. "*Tortious conduct must be a factual cause of harm for*

<sup>11</sup> Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 26, Cmt. J (2005); see also Arno C. Becht & Frank W. Miller, The Test of Factual Causation in Negligence and Strict Liability Cases, 130-134 (1961); Dan B. Dobbs, The Law of Torts, § 171, 416 (2000); Bert Black & David H. Hollander, Jr., Unraveling Causation: Back to Basics, 3 U. Bal. J. Env'tl L. 1 (1993); William V. Dorsaneo, III, Judges, Juries, and Reviewing Courts, 53 S.M.U. L. Rev. 1497, 1528-1530 (2000) (substantial factor "render[s] the causation standard considerably less intelligible"); Leon Green, The Torts Restatement, 29 Ill. L. Rev. 582, 606 (1935); Charles O. Gregory, Proximate Cause in Negligence—A Retreat From Rationalization, 6 U. Chi. L. Rev. 36, 59-61 (1938); David W. Robertson, The Common Sense of Cause in Fact, 75 Tex. L. Rev. 1765, 1776 (1997) ("By using the term [substantial factor] in three different senses, the Restatement (Second) of Torts has contributed to a nationwide confusion on the matter."); Jane Stapleton, Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences, 54 Vand. L. Rev. 941, 945, 978 (2001) ("The obfuscating terminology of legal cause, proximate cause and substantial factor should be replaced ..."); Robert Strassfeld, If...: Counterfactuals in the Law, 60 Geo. Wash. L. Rev. 339, 355 (1992); Richard W. Wright, Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility, 54 Vand. L. Rev. 1071, 1080 (2001); H.L.A. Hart & A.M. Honore, Causation in the Law, 124 (2d ed. 1985) ("Little, however, seems to be gained by describing, even to a jury, such cases in terms of the admittedly indefinable idea of a 'substantial factor.'"); W. Page Keeton et al., Prosser and Keeton on Torts, § 41, at 43-45 (5th ed. Supp. 1988) ("Even if 'substantial factor' seemed sufficiently intelligible as a guide in time past, however, the development of several quite distinct and conflicting meanings for the term 'substantial factor' has created a risk of confusion and misunderstanding, especially when a court, or an advocate or scholar, uses the phrase without indication of which of its conflicting meanings is intended."). For substantial criticism of its use in the ordinary case by the first court to employ it for over determined causal situations, see Seward v. Minneapolis Ry. Co., 25 N.W.2d 221, 224 (Minn. 1946) (using substantial factor for factual cause "leave[s] the jury afloat without a rudder ... and to decide the case according to whim rather than law").

<sup>12</sup> The new Restatement of Torts, under the section on multiple sufficient causes, has completely abandoned the substantial contributing factor test, even in the narrow category of cases to which it has traditionally been approved. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 27 & Cmt. A (2005).

*liability to be imposed. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct.*" Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 26 (2005) (emphasis added).

Where there are potentially multiple causes, the Third Restatement makes clear that but for (without which the harm would not have occurred) remains the operative test. Section 27 states that "[I]f multiple acts occur, each of which under § 26 alone would have been a factual cause of the physical harm at the same time in the absence of other act(s), each act is regarded as a factual cause of the harm." *Id.* Comment A goes on to reiterate that § 27 applies "whenever there are two or more competing causes, each of which is sufficient without the other to cause the harm and each of which is in operation at the time the plaintiff's harm occurs. *Id.* at § 27, Cmt. A. As such, the Third Restatement makes clear that even in the case of multiple causes, each multiple cause must be a factual or a but-for cause of the harm in order for there to be liability. Substantial contributing factor test and language is fraught with problems and is unnecessary. As the ALI states:

[T]he substantial-factor rubric tends to obscure, rather than to assist, explanation and clarification of the basis of these decisions. *The element that must be established, by whatever standard of proof, is the but-for or necessary-condition standard of this Section.* Section 27 provides a rule for finding each of two acts that are elements of sufficient competing causal sets to be factual causes without employing the substantial-factor language of the prior Torts Restatements. There is no question of degree for either of these concepts. *Id.* § 26, Cmt. J (emphasis added).

It is time for Massachusetts courts to join the modern age and utilize the proper standard for causation.

## **II. The Substantial Contributing Factor Language Should Not Be Used And Is Inapplicable To This Case**

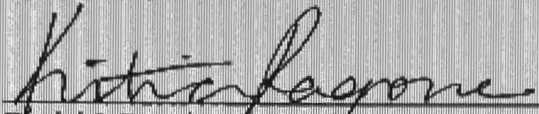
Fundamentally, and as set forth above, in order to be liable, the particular Defendant must be a but-for cause of the harm. That is "conduct is a factual cause of harm when the harm would not have occurred absent the conduct." Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 26 (2005). The substantial contributing factor causation relic has no place in the jury instructions of this case. Application of "substantial contributing factor" language in this case would wrongly dilute the required burden of proof. The Defendant may only be liable if its alleged negligence was the but-for cause of the patient's injury.

Indeed, the use of "substantial contributing factor" language in this case would be erroneous and troubling because of the inherent ambiguity in the term "substantial." As noted above, case law and scholarly authority affirm that courts may no longer blindly rely on the ability of jurors to ascertain what substantial means. Moreover, dictionaries and the MCLE do not provide adequate instruction. Use of substantial contributing cause can only lead to misapplication, misunderstanding and dilution of the required burden of proof. Only where the particular defendant is both the legal cause and cause in fact of a plaintiff's harm can a defendant be held liable.

The but-for test for causation provides the adequate and cognizable instruction for the jury in this case. The question on causation for the jury is a simple one; but-for defendant's action, would the patient have been injured. A but-for test for causation (without which it would not have occurred) is the proper standard, preserves the more probable than not standard for the governing burden of proof, does not invite confusion as to the definition of vague and ambiguous terms and, comports with modern thinking and scholarly criticism as reflected in the Third Restatement.

WHEREFORE, based upon the foregoing, the Defendant respectfully requests that but-for causation (without which the harm would not have occurred) be utilized and presented to the jury on the issue of causation.

Respectfully submitted,  
Defendant, PMG Physician Associates, P.C.  
By Counsel,



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